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I. INTRODUCTION

In 2003, Professor M. Cherif Bassiouni, one of the foremost experts on extradition, proposed a "radical new approach" to current extradition practices.[1] Among the problems identified which compel the changes he suggested, Professor Bassiouni singled out the "stagnation" in the current system. Issues that have existed since the first U.S. extradition case are still being grappled with and

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1. M. Cherif Bassiouni, *Reforming International Extradition: Lessons of the Past for a Radical New Approach*, 25 LOY. L.A. INT'L & COMP. L. REV. 389 (2003).

U.S. extradition legislation "has not been comprehensively overhauled" since 1848.[2] He argued for replacing the current treaty-based practice of extradition that is hampered by "undue formalities" with a new system predicated upon international comity[3] and a comprehensive approach to U.S. legislation "on all modalities of international cooperation in penal matters."[4] The result should be more "efficient and expeditious extradition proceedings . . . consistent with the application of the same norms and standards the judiciary must apply in ordinary criminal cases."[5]

One such formality, peculiar to international extradition cases, is the rule of specialty.[6] Specialty prevents the requesting state from trying the defendant for an offense other than one for which he was extradited and requires that he be given a reasonable time to leave the country before being prosecuted for any other offense committed prior to the extradition.[7] Since "few foreign countries"[8] have "the complex criminal laws the United States has enacted,"[9] specialty would preclude prosecutions for more sophisticated or esoteric crimes[10] for which surrender was not ordered. And if, as

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2. *Id.* at 401.

3. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 30 (4th ed. 1990) ("Oppenheim writes of 'the rules of politeness, convenience and good-will observed by States in their mutual intercourse, without being legally bound by them.'").

4. Bassiouni, *supra* note 1, at 402.

5. *Id.* at 401.

6. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 477 (1987) [hereinafter RESTATEMENT]. The rule is also sometimes called "speciality," a term which some scholars prefer. *See* Christopher L. Blakesley, *Extradition Between France and the United States: An Exercise in Comparative and International Law*, 13 VAND J. TRANSNAT'L. L. 653, 706 n.187 (1980). This article will, however, use the term "specialty" since that is generally the way the rule is referred to in the United States. *See, e.g.*, RESTATEMENT, *supra*, § 477.

7. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 429 (3d ed. 1996).

8. Bassiouni, *supra* note 1, at 404.

9. *Id.*

10. Consider, for example, cybercrime. Cybercrime is perpetrated by using global electronic networks. Criminal Justice Resources: Cybercrime, http://staff.lib.msu.edu/harris23/crimjust/cybercri.htm (last visited Jan. 6, 2010). Cybercriminals operate anonymously, are not hampered by national boundaries, and are notoriously hard to catch. *See, e.g.*, Michael Coren, Experts: Cyber-crime bigger threat than cyber-terror (Jan. 24, 2005), http://www.cnn.com/2005/TECH/internet/01/18/cyber.security/index.html (reporting that in 2003 the then fastest spreading computer worm, the Sapphire or Slammer, infected 90% of the world's vulnerable hosts within ten minutes of the first infection and concluding "[t]here is no conceivable way for system administrators to respond to threats of this speed."). Consequently, cybercrime presents formidable challenges for law enforcement. PRESIDENT'S WORKING GROUP ON UNLAWFUL CONDUCT ON THE INTERNET, THE ELECTRONIC FRONTIER: THE CHALLENGE OF UNLAWFUL CONDUCT INVOLVING THE USE OF THE INTERNET (2000), http://www.usdoj.gov/criminal/cybercrime/unlawful.htm. When computers are used

many scholars insist, specialty is a rule of customary international law,[11] this would be true whether extradition took place pursuant to a treaty or the more flexible, comity-based system advocated by Professor Bassiouni.[12] This article therefore will consider whether specialty is a rule of customary international law, binding upon states even in the absence of a treaty.[13]

Part II of the article will trace the origin of the rule of specialty in U. S. extradition law. Part III will analyze the seminal case, *United States v. Rauscher*,[14] and will argue that its conclusion that specialty was customary law should be discounted. Part IV will consider U.S. practice since *Rauscher* to show that it has never been consistent with *Rauscher's* holding that specialty is a rule of customary law.[15] And, Part V will conclude that specialty has never been more than a rule of international comity and that it should no longer be followed by the United States in either treaty or comity-based extraditions.

II. THE ORIGINS OF THE RULE OF SPECIALTY IN U.S. EXTRADITION LAW

A. *Background*

Despite the fact that "an incipient *modern* extradition treaty" existed as early as 1376, the "modern" practice of extradition via bilateral treaty did not become well established until the eight-

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merely as communications devices in order to commit ordinary crimes, such as the illegal sale of prescription drugs, controlled substances, alcohol, and guns, as well as other crimes like fraud, gambling, and child pornography, the President's Working Group found that existing laws are "generally sufficient" and established as a basic principle that "online and offline conduct should be treated consistently and in a technology-neutral way." *Id.* The same cannot be said for those crimes where "the confidentiality, integrity, or availability of a computer's information or services is attacked," using techniques such as "hacking" and "denials of service." *Id.* In these instances, special statutes, which other countries unaffected by the problem are unlikely to have enacted, are required to deal with previously unknown phenomena. *See, e.g.*, 18 U.S.C. § 1030 (2006).

11. Professor Bassiouni has written that "[s]pecialty . . . is so broadly recognized in international law and practice that it has become a rule of customary international law. As such, it is binding upon the United States." BASSIOUNI, *supra* note 7, at 430.

12. *See* Fiocconi v. Att'y Gen., 462 F.2d 475, 479 (2d Cir. 1972), *cert. denied*, 409 U.S. 1059 (1972) (specialty applied to comity-based extraditions).

13. *See supra* text accompanying note 11; *see* cases cited *infra* notes 62, 132 and accompanying text.

14. United States v. Rauscher, 119 U.S. 407 (1886).

15. *Rauscher* also held that specialty was a treaty-based rule which could be invoked by individuals in U.S. courts, i.e., that the rule is self-executing. Rauscher, 119 U.S. at 430-31. That aspect of *Rauscher's* holding is beyond the scope of this article.

eenth century.[16] Prior to that time, the practice of one state seeking the return of a fugitive from another usually occurred when the fugitive had committed some sort of political offense (e.g. a treasonous or seditious act), as opposed to an "ordinary" crime.[17] Because of the political nature of these offenses, rulers zealously guarded their right to grant asylum to political fugitives,[18] and attempts by "a foreign power to obtain jurisdiction over any person within another power's territory represented as least a potential treat [sic] to the sovereignty of the requested ruler."[19] As the practice of extradition shifted from seeking the return of political enemies to obtaining jurisdiction over criminals, the rules of specialty and double criminality developed in order to ensure that extraditions were not sham political renditions.[20]

The rule of specialty in its modern form appeared for the first time in an extradition treaty between France and Saxony in 1850.[21] The first U.S. treaty to contain the rule was the 1868 agreement with Italy.[22] At that time, absent such a provision, the United States insisted on the right to try an extradited fugitive for any offense, whether extradition had been granted for it or not.[23] It was this insistence that led to a suspension of the United States–Great Britain Extradition Treaty of 1842[24] in the cases of *Lawrence* and *Winslow*.[25]

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16. Christopher L. Blakesley, *The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History*, 4 B.C. INT'L & COMP. L. REV. 39, 50 (1981); *see also* William Beach Lawrence, *The Extradition Treaty*, 14 ALB. L. J. 85, 87 (1876) (stating that the term extradition in its modern sense was first used in 1791).

17. Blakesley, *supra* note 16, at 49; *see also* Lawrence, *supra* note 16, at 87 (stating that ancient treaties "were not treaties for the administration of ordinary criminal jurisprudence but related to political matters as affecting the security of the State, involving high treason and sometimes other felonies.").

18. *See* Lawrence, *supra* note 16, at 86 (stating that asylum is "an inviolable attribute of independent sovereignty").

19. Blakesley, *supra* note 16, at 45 (citation omitted).

20. *Id.* at 49-50.

21. *Id.* at 52.

22. 1 JOHN BASSETT MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION, 194 (1891).

23. 2 DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES 758-59 (Francis Wharton, ed., 2d ed., Washington, D.C., Gov't Printing Office1887) [hereinafter DIGEST OF INTERNATIONAL LAW].

24. Convention on Boundaries, the Slave Trade and Extradition, U.S.-Gr. Brit., art. X Aug. 9, 1842, 8 Stat. 572 [hereinafter Webster-Ashburton Treaty].

25. 1 MOORE, *supra* note 22, at 211.

B. The Cases of Lawrence *and* Winslow[26]

Pursuant to the Webster-Ashburton Treaty, Lawrence was extradited from Great Britain to the United States in 1875.[27] Despite the fact that he had been extradited for forgery, the United States insisted that it could try Lawrence for smuggling.[28] In the meantime, the United States requested the extradition of Winslow who had been charged with forgery in Massachusetts.[29] Great Britain responded by refusing to extradite Winslow until it received a guarantee from the United States that Winslow would be tried only on those charges for which he was extradited.[30] The United States refused, claiming that in the absence of a treaty provision, it did not have the power to "give any stipulation or make any arrangement whatever as to the offences for which he should be tried when returned to the justice of the State against whose laws he may have offended."[31]

Great Britain argued that the rule of specialty applied, even though the treaty did not contain such a provision. Some of its arguments were that specialty was an "'essential principle of extradition, . . . as practised' by Great Britain";[32] that there was an "implied understanding" between the two countries that the rule applied in cases under the 1842 treaty; [33] that it would violate U.S.

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26. *See generally* Jacques Semmelman, *The Doctrine of Specialty in the Federal Courts: Making Sense of* United States v. Rauscher, 34 VA. J. INT'L L. 71, 114-30 (1993-94).

27. 1 MOORE, *supra* note 22, at 202-06.

28. *Id.*

29. Letter from Hamilton Fish to Gen. Schenck (Feb. 17, 1876), *in* U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 205 (New York, Kraus 1966) (1876) [hereinafter FOREIGN RELATIONS].

30. *See* Letter from Hamilton Fish to Gen. Schenck (Feb. 21, 1876), *in* FOREIGN RELATIONS, *supra* note 29, at 205-06 (describing a conversation Secretary Fish had with Lord Derby, the British Foreign Secretary); Telegram from General Schenck to Secretary Fish (March 2, 1876), *in* FOREIGN RELATIONS, *supra* note 29, at 206 ("Lord Derby . . . declines to give up Winslow unless promise is made by law or by arrangement that he shall be tried only for the extradition crime.").

31. 1 MOORE, *supra* note 22, at 199 (quoting FOREIGN RELATIONS, *supra* note 29, at 233).

32. 1 MOORE, *supra* note 22, at 200 (quoting Letter from Lord Derby to Colonel Hoffman, acting Chargé d'Affaires of the United States in London (June 17, 1876)).

33. 1 MOORE, supra note 22, at 197; *see also* Letter from Mr. Fish, Sec'y of State, to Mr. Hoffman (Mar. 31, 1876), *in* DIGEST OF INTERNATIONAL LAW, *supra* note 23, at 760. At least one contemporary commentator agreed with Great Britain: "To suppose that under these provisions the extradited person could be tried for any other crime than that for which he was extradited, would be to render nugatory all the provisions which confine the treaty, by naming them, to specified offenses." Lawrence, *supra* note 16, at 90. The British position was hardly farfetched given the fact that the implementing legislation of both countries contained identical language implying that there was a reciprocal understanding that those surrendered would be tried only for extradited offenses. *See* Letter of Lord

law to prosecute Lawrence for a crime for which extradition had not been granted; [34] and that specialty was a rule of customary international law.[35] In response, the United States stuck to its position that specialty was exclusively a treaty-based right:

Derby to Mr. Hoffman (May 4, 1876), *in* FOREIGN RELATIONS, *supra* note 29, at 227. The British statute enacted in 1843 provided:

> [T]hat such persons as should thereafter be extradited to the United States should be delivered "to such person or persons as shall be authorized in the name of the United States to receive the person so committed, and to convey him to the United States, *to be tried for the crime of which such person shall be accused.*"

Commonwealth v. Hawes, 76 Ky. (13 Bush) 697, 707 (1878) (emphasis added) (quoting Extradition Act, 6 & 7 Vict., c. 76 (1843) (Eng.)); *see also* Lawrence, *supra* note 16, at 95. The U.S. statute of August 12, 1848 provided:

> That it shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized, in the name and on behalf of such foreign government, *to be tried for the crime of which such person shall be so accused*, and such person shall be delivered up accordingly . . . .

Act of Aug. 12, 1848, ch. 167, 9 Stat. 302 (emphasis added).

34. Letter of Hamilton Fish to Mr. Hoffman (Mar. 31, 1876), *in* DIGEST OF INTERNATIONAL LAW, *supra* note 23, at 761. Secretary Fish's response to the British was that "[t]he act of August 12, 1848 . . . does not affect or limit the rights of the two Governments on the question." *Id.* at 763. It merely "provides the machinery, and prescribes the general mode of procedure, but does not assume to determine the rights of the United States, or of any other state, which are governed wholly by the particular provisions of the several treaties." *Id.* at 763.

Lawrence, meanwhile, had petitioned the Attorney General of the United States, arguing that an 1869 statute also barred his prosecution:

> Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, *until the final conclusion of his trial for the crimes or offences specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offences*, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the military thereof, as may be necessary for the safe-keeping and protection of the accused.

1 MOORE, *supra* note 22, at 204-05 (emphasis added). The Solicitor General perfunctorily rejected Lawrence's arguments: "[N]o ground has been laid for an order to discharge the petitioner from further prosecution upon the criminal matters specified in the petition." 15 Op. Att'y Gen. 500, 513 (1875); *see also* 1 MOORE, *supra* note 22, at 204. William Beach Lawrence, writing in 1877, disagreed: "The act of 1869, for the protection of a person extradited under a treaty (Revised Statutes § 5275), I consider . . . sufficient to meet the case of a trial for an offense for which the prisoner was not surrendered." William Beach Lawrence, *Extradition*, 16 ALB. L.J. 361, 364 (1877).

35. 1 MOORE, *supra* note 22, at 203; *See also* Letter of Mr. Fish, Sec'y of State, to Mr. Hoffman (Mar. 31, 1876), *in* DIGEST OF INTERNATIONAL LAW, *supra* note 23, at 761 ("it would be a violation . . . of the general laws of extradition of all countries"). According to Moore, at that time there was "[a]mong writers on international law . . . an almost uniform concurrence in the opinion that a person surrendered for one offence should not be tried for another until he shall have been replaced within the jurisdiction of the surrendering state or had an opportunity to return thereto." 1 MOORE, *supra* note 22, at 217-219. As a rule of customary international law, specialty would have been applicable in the courts of the United States as "a special form of the common law." MARK W. JANIS, AN INTRODUCTION

> [I]f the surrendered fugitive is to find immunity from trial for other than the offense named in the warrant of extradition, he must find such immunity guaranteed to him by the terms of the treaty, not in the act of Congress. The treaties which contain the immunity from trial for other offenses have been celebrated since the date of the act of 1848.[36]

The U.S. insistence that the 1848 statute did not commit it to the rule of specialty in a treaty-based extradition with Great Britain was dubious at best, since the 1848 statute predated the first U.S. treaty containing the rule of specialty by twenty years.[37] A more plausible interpretation is that the 1848 statute governed extraditions to and from the only two states with which the U.S. then had extradition treaties—Great Britain and France.[38] This conclusion is strengthened, especially with regard to Great Britain, by the reciprocal character and nearly identical language in the implementing legislation of the two countries.[39]

The actual practice under the treaty was also hotly disputed. The United States claimed that in both countries "surrendered fugitives have been tried for other offenses than those for which they were delivered."[40] Britain distinguished one of the cases cited by the United States as a "private prosecution" which there-

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TO INTERNATIONAL LAW 102 (4th ed. 2003). Not long after the Lawrence-Winslow controversy, the Supreme Court of the United States famously stated, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." The Paquette Habana, 175 U.S. 677, 700 (1900).

36. Letter from Mr. Fish, Sec'y of State, to Mr. Hoffman (Mar. 31, 1876), *in* DIGEST OF INTERNATIONAL LAW, *supra* note 23, at 763-70.

37. *See* 1 MOORE, *supra* note 22 and accompanying text.

38. Letter from Mr. Fish, Sec'y of State, to Mr. Hoffman (Mar. 31, 1876), *in* DIGEST OF INTERNATIONAL LAW, *supra* note 23, at 763. The 1848 statute was the first U.S. extradition legislation. Between 1794, when the United States entered into Jay's Treaty with Great Britain, and 1848, extradition took place "without the benefit of national legislation." Bassiouni, *supra* note 1, at 397. The conclusion that the statute was intended to implement the 1842 treaty is strengthened by its title, which could only have referred to the U.S. treaties with Great Britain and France: "An Act For giving Effect to certain Treaty Stipulations between this and foreign governments, for the Apprehension and delivering up of certain Offenders." Ch. 167, 9 Stat. at 302. While not referring to the rule of specialty, Congressman Ingersoll, who moved passage of the bill in the House of Representatives, stated, "The object of this bill was to appoint officers and to authorize others to carry out the provisions of the treaties with France and England." CONG. GLOBE 868, 30th Cong., 1st Sess. 868 (1848). Likewise, in the Senate, "Mr. Dayton referred to the existing treaties on the subject with Great Britain and France." CONG. GLOBE, 30th Cong., 1st Sess. 1008 (1848).

39. *See supra* note 33 and accompanying text.

40. Letter from Mr. Fish, Sec'y of State, to Mr. Hoffman (Mar. 31, 1876), *in* DIGEST OF INTERNATIONAL LAW, *supra* note 23, at 763.

fore did not indicate its departure from the rule of specialty.[41] As to the others, where the defendants were extradited to the United States from Canada, Great Britain responded that it had no "knowledge" of a case in which a defendant was "surrendered by England for one offense and tried by the United States for a different one."[42]

The matter ended in a stalemate of sorts. Only after the treaty was suspended[43] for six months and "many" fugitives escaped justice,[44] did Great Britain agree to resume extraditions. It did so "as a temporary measure, until a new extradition treaty can be concluded," since by then it appeared that Lawrence would not be tried for any other offenses.[45] Great Britain agreed to the resumption although it had never received an assurance that Winslow would not be tried for non-extradited offenses.[46] Privately, however, its commitment was conditioned on the United States continuing to forbear such prosecutions.[47]

The resumption of relations under the 1842 Treaty was far from "temporary." A new treaty would not take effect until 1889.[48] In the meantime the issue would arise again, this time ending up in the United States Supreme Court.

III. *UNITED STATES V. RAUSCHER*: SPECIALTY AS CUSTOMARY INTERNATIONAL LAW

A. *The* Rauscher *Decision*

William Rauscher was extradited from Great Britain to the United States pursuant to the Webster-Ashburton Treaty to stand trial for the murder of one member of the crew of a ship of which he was an officer.[49] Instead he was tried and convicted of inflicting cruel and unusual punishment on the crewmember, an offense

41. Letter from Mr. Fish, Sec'y of State, to Mr. Hoffman (May 22, 1876), *in* DIGEST OF INTERNATIONAL LAW, *supra* note 23, at 772.

42. *Id.*

43. President Grant suspended the treaty in a message to Congress on June 20, 1876. Message from Ulysses S. Grant, President of the United States, to Congress (June 20, 1876), *in* DIGEST OF INTERNATIONAL LAW, *supra* note 23, at 786-89.

44. 1 MOORE, *supra* note 22, at 211 n.3.

45. *Id.* at 210.

46. *Id.* at 210-11.

47. Semmelman, *supra* note 26, at 128.

48. Extradition Convention between the United States and Her Britannic Majesty, U.S.-Gr. Brit., art. III, July 12, 1889, 26 Stat. 1508.

49. *Rauscher*, 119 U.S. at 409.

not included in the treaty.[50] In deciding that Rauscher could not be tried for an offense other than the one for which he had been extradited, Justice Miller largely adopted the positions advanced by the British regarding the rule of specialty in the Lawrence and Winslow cases.[51] Thus, specialty was implicit in a treaty that enumerated the offenses for which one could be extradited;[52] prosecution in derogation of the rule would violate the two statutes adopted by Congress to implement U.S. extradition treaties, which are "conclusive upon the judiciary of the right conferred upon persons brought from a foreign country into this under such proceedings";[53] and the rule was "recognized public law" from which the treaty "did not intend to depart."[54]

The first two prongs of *Rauscher's* specialty reasoning—that it is implicit in a treaty with enumerated offenses and that it was reflected in U.S. statutes—while plausible are not as ineluctable as Justice Miller had asserted.[55] And, in any case, the incorpora-

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50. *Id.* Unlike in the Lawrence and Winslow cases, there apparently was no diplomatic protest by Great Britain, since neither the Supreme Court's opinion nor Moore mention one. *See also* United States v. Alvarez-Machain, 504 U.S. 655, 667 (1992) (noting that "no importance was attached to whether or not Great Britain had protested the prosecution of Rauscher").

51. This is not terribly surprising given Justice Miller's citation to, and praise of, William Beach Lawrence's articles supporting the British position in the Lawrence and Winslow cases. *See Rauscher*, 119 U.S. at 416. Justice Miller lauded Lawrence as a "very learned authority on matters of international law . . . ." *Id.*

52. "Indeed, the enumeration of offenses . . . is so specific and marked by such a clear line in regard to the magnitude and importance of those offenses, that it is impossible to give any other interpretation to it than that of the exclusion of the right of extradition for any others." *Id.* at 420. And, if a "party is properly liable for any other offense than that for which he was demanded and which is described in the treaty[,] [t]here would . . . seem to be no need of a description of a specific offense in making the demand." *Id.* at 421. Finally, the fact that the treaty provides that the party whose extradition is demanded is entitled to a hearing at which it must be proved that he committed one of the seven enumerated offenses "leave[s] no reason to doubt that the fair purpose of the treaty is that the person shall be delivered up to be tried for that offense and no other." *Id.* at 422-23 (alteration in original).

53. *Rauscher*, 119 U.S. at 424.

54. *Id.* at 420.

55. *See supra* note 52 and accompanying text; *Rauscher*, 119 U.S. at 424. An equally plausible conclusion was that by enumerating offenses the United States and Great Britain intended merely to insure that extradition for political offenses would not take place. When President Tyler submitted the Webster-Ashburton Treaty to the Senate for ratification, he explained that "[i]n this careful and specific enumeration of crimes, the object has been to exclude all political offenses, or criminal charges arising from wars or intestine commotions." President John Tyler, Message to the Senate (Aug. 11, 1842), *in* 1 MOORE, *supra* note 22, at 214. *See also* Semmelman, *supra* note 26, at 93 (concluding that "the rationale behind the enumeration of offenses, from the perspective of both the United States and Great Britain, was to protect political offenders, not to incorporate the much broader principle of specialty into the Treaty").

tion of some form of the rule of specialty in nearly every U.S. extradition treaty since *Rauscher*[56] greatly reduces the importance of its conclusion that specialty is implicit in treaties with enumerated offenses. Similarly, the statutory rule of specialty[57] applies by its terms only to the "offenses specified in the warrant of extradition" and thus does not confer the right in non treaty-based renditions.[58] Thus the focus of this article is Justice Miller's finding that specialty was a rule of customary international law because, if correct, the rule would bind the United States, even if the fugitive were surrendered as a matter of comity.[59]

B. The Status of the Rule of Specialty in 1842

The classic articulation of how customary international law comes into existence is found in a case decided by the U.S. Supreme Court only a few years after *Rauscher*. In *The Paquette Habana*,[60] Justice Gray,[61] writing for the Court, described the process by which coastal fishing vessels became exempt from capture as prizes of war as "an ancient usage among civilized nations, beginning centuries ago and gradually ripening into a rule of international law."[62] Later in the opinion he made it clear that such a rule must be demonstrated by "the general consent of the civi-

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The statutory premise was also less than airtight. The 1848 and 1869 statutes arguably relate only to protecting the accused in cases where extradition is granted and do not affect the jurisdiction of U.S. courts. *Cf. Alvarez-Machain*, 504 U.S. at 678 n.18 (Stevens, J., dissenting); Semmelman, *supra* note 26, at 107 n.255.

56. *See* CHARLES DOYLE, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS: EXTRADITION TO AND FROM THE UNITED STATES: OVERVIEW OF THE LAW AND RECENT TREATIES 31-33 (2007), *available at* http://www.fas.org/sgp/crs/misc/98-958.pdf.

57. Act of June 25, 1948, ch. 645, 62 Stat. 825 (codified at 18 U.S.C. § 3192 (2006)). The only difference between the current statute and the one quoted in *Rauscher* is that the phrase "crimes and offenses" now reads "offenses." *See* United States Rev. Stat. § 5275.

58. *Alvarez-Machain*, 504 U.S. at 678 (interpreting *Rauscher* to mean that "two federal statutes . . . imposed the doctrine of specialty upon extradition treaties to which the United States was a party"); United States v. DiTommaso, 817 F.2d 201, 212 (2d Cir. 1987) ("No warrant of extradition issued in this case. Consequently, the sole limitation arguably placed by this statute on Molina-Chacon's prosecution is that he face trial only for offenses of which he is 'duly accused.'"); *Fiocconi*, 462 F.2d at 482.

59. *See infra* note 158 and accompanying text.

60. *Paquette Habana*, 175 U.S. 677.

61. Interestingly, Justice Gray, who was on the *Rauscher* Court, only concurred in that case on the ground that the rule of specialty was embodied in the two federal statutes. *Rauscher*, 119 U.S. at 433. As to the broader question whether the rule existed "independently of any act of congress, and in the absence of any affirmative restriction in the treaty," Justice Gray was "not satisfied that that is a question of law, within the cognizance of the judicial tribunals, as contradistinguished from a question of international comity and usage." *Id.*

62. *Paquette Habana*, 175 U.S. at 686.

lized nations of the world, and independently of any express treaty or other public act."[63] Measured by these standards, there is little if any evidence which supports Justice Miller's conclusion in *Rauscher* that in 1842 specialty was "the recognized public law which had prevailed in the absence of treaties" and from which the Webster-Ashburton Treaty "did not intend to depart."[64]

First of all, very few extraditions involving the United States had taken place prior to 1842. There was one prominent case under the 1788 Consular Convention between France and the United States,[65] which required the surrender of deserting sailors, in which the Supreme Court refused to issue a writ of mandamus compelling a district court judge to issue a warrant of surrender.[66] The France-United States Consular Convention was abrogated by Congress in 1798.[67]

The 1794 Jay Treaty with Great Britain[68] contained the first "full-fledged extradition provision" relating to the surrender of fugitives who had committed ordinary crimes.[69] In 1799 the extradition of a U.S. citizen to Great Britain for a murder committed aboard a British vessel sparked a constitutional controversy that contributed to John Adams' defeat in his bid for a second term as president[70] and resulted in a cessation of U.S. extraditions for more than forty years.[71]

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63. *Id.* at 677.

64. *Rauscher*, 119 U.S. at 420. *See also* Semmelman, *supra* note 26, at 105-06 (arguing that "Miller's assertion that the Treaty 'did not intend to depart . . . from the recognized public law' assumed, incorrectly, that specialty had been such a principle in 1842 when the treaty was made.") (quoting *Rauscher*, 119 U.S. at 430-33).

65. Convention Between His Most Christian Majesty and the United States of America for the Purpose of Defining and Establishing the Functions and Privileges of their Respective Consuls and Vice-Consuls, U.S.-Fr., art. IX, Nov. 14, 1788, 8 Stat. 106, *abrogated by* Act of July 7, 1798, ch. 67, 1 Stat. 578. This convention was the first entered into by the U.S. which required the surrender of fugitives, albeit it was not a full blown extradition agreement. *See* John T. Parry, *The Lost History of International Extradition Litigation*, 43 VA. J. INT'L L. 93, 105 (2002).

66. United States v. Lawrence, 3 U.S. (3 Dall.) 42 (1795) (per curiam). For a discussion of the significance of the case, *see* Parry, *supra* note 65, at 105-08.

67. Parry, *supra* note 65, at 105 n.58.

68. Treaty of Amity, Commerce and Navigation Between His Britannic Majesty and the United States of America, U.S.-Gr. Brit., art. XXVII, Nov. 19, 1794, 8 Stat. 116 [hereinafter Jay's Treaty].

69. Parry, *supra* note 65, at 108.

70. Semmelman, *supra* note 26, at 92. For detailed descriptions of the infamous *Robins* case, *see Reforming International Extradition*, *supra* note 1, at 391-97; Parry, *supra* note 65, at 108-14.

71. Parry, *supra* note 65, at 114. The extradition provision of Jay's Treaty lapsed in 1806. *Id.* at 114 n.111.

Neither of these early cases involved the rule of specialty. Therefore, given the paucity of U.S. extraditions in the period from 1789 to 1842, it is impossible to conclude that the United States had any general practice regarding specialty prior to that time.[72]

There is a similar lack of evidence supporting the existence of the rule in the practice of other countries. As has been noted above, extraditions for ordinary criminal offenses were almost unheard of before the eighteenth century.[73] And though the practice grew rapidly after that,[74] specialty did not become a feature of extradition treaties until 1850[75] and the first U.S. agreement containing such a provision was entered into in 1868.[76] Where then did Justice Miller find the evidence of the "general consent" of nations independent of "any express treaty or other public act" necessary to support the existence of a customary law rule of specialty? The answer is that he relied on the "doctrine of publicists and writers on international law."[77]

An examination of these authorities[78] reveals that not only do they generally not support Justice Miller's conclusion that specialty was customary international law but in some instances suggest quite the opposite.[79] First, it should be noted that none of the

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72. For example, Lawrence quotes correspondence he received from Mr. O'Conor, the district attorney who handled the Heilbronn case. William Beach Lawrence, *Extradition*, 15 ALB. L.J. 224, 225 (1877). Heilbronn was extradited from the United States to Great Britain in the 1850's and it is one of the cases cited by the United States during the Lawrence and Winslow controversy because Heilbronn was thereafter prosecuted in England for an offense for which he was not extradited. Letter of Mr. Fish, Sec'y of State, to Mr. Hoffman (May 22, 1876), *in* DIGEST OF INTERNATIONAL LAW, *supra* note 23, at 773. Mr. O'Conor told Lawrence that he had considered asking the British for a guarantee that Heilbronn would not be prosecuted for any other offenses but apparently chose not to do so. *Lawrence*, *supra*, at 225. Significantly, O'Conor considered making such a demand "without any conception that exacting the pledge could be regarded as a failure to conform to the treaty," observing that "there never was much practice under these extradition treaties, and attention was never drawn . . . to this possible abuse in acting under them until the British act of 1870." *Id.*

73. Blakesley, *supra* note 16, at 50.

74. Blakesley counted 92 extradition treaties that were entered into between 1718 and 1830. *Id.* at 50 n.48.

75. *Id.* at 52.

76. 1 MOORE, *supra* note 22, at 194.

77. *See Rauscher*, 119 U.S. at 419.

78. These writers were described by one author as being of "modest authority." Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After Alvarez-Machain*, 45 STAN. L. REV. 939, 946 n.41 (1993).

79. *Cf. id.* at 946 ("*Rauscher* rested on unsure legal foundations when decided, endorsing an allegedly widespread principle of the law of nations for which only mixed support actually existed and which the United States government vigorously opposed."); *See Rauscher*, 119 U.S. at 415-31.

authorities cited by the Court squarely addresses the question whether specialty was a rule of customary international law in 1842 when the Webster-Ashburton Treaty took effect. In 1884, Spear, whose examination of the law of extradition was, according to Miller, "so full and careful that it leaves nothing to be desired in the way of presentation of authorities,"[80] wrote that "there is not now in Europe, if there ever were, any international law of extradition beyond that which treaties create and prescribe."[81] Clarke described the Extradition Act of 1870, which introduced specialty into British law, as correcting "serious defects" in British extradition law, including that "[n]either the then existing treaties nor the Acts of Parliament, by which they had been put in force, contained . . . any provision preventing the trial of a fugitive when once surrendered for offences other than that for which his rendition had been claimed."[82] An anonymous article in the American Law Review discussing the Winslow case, purportedly written by Judge Lowell of the U.S. District Court in Boston,[83] limits its endorsement of the rule to those cases where "a person [is] surrendered by one sovereign to another, under a treaty of extradition."[84] And Field's *Outlines of an International Code* finds its support for the rule in the 1868 Extradition Treaty between the United States and Italy,[85] the first U.S. extradition agreement to contain such a provision.[86] That leaves only one of the cited authors, William Beach Lawrence, who does come close to supporting Justice Miller's conclusion that specialty was customary international law.

In 1876-77, Lawrence wrote three letters which were published in the Albany Law Journal. [87] The first, which was a critique of the position the United States had taken in the Lawrence and Winslow cases,[88] is the only one that squarely addressed the

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80. *Rauscher*, 119 U.S. at 417.

81. SAMUEL T. SPEAR, THE LAW OF EXTRADITION, INTERNATIONAL AND INTER-STATE 4 (3d ed. 1885).

82. EDWARD CLARKE, A TREATISE UPON THE LAW OF EXTRADITION 162 (3d ed. 1888). This is a later edition of the same work cited by Justice Miller. *See Rauscher*, 119 U.S. at 417.

83. *See Rauscher*, 119 U.S. at 416.

84. Note, *Winslow's Case*, 10 AM. L. REV. 617, 618 (1875).

85. DAVID DUDLEY FIELD, OUTLINES OF AN INTERNATIONAL CODE § 237 n.1 (2d ed. 1876).

86. 1 MOORE, *supra* note 22.

87. *See* Lawrence, *supra* note 16; Lawrence, *supra* note 77; Lawrence, *supra* note 34.

88. Lawrence, *supra* note 16, at 85 ("The view [regarding the Winslow case] taken by the United States being, as I conceived, . . . at variance with the text of the treaty as con-

status of the rule of specialty as international law. It contained a detailed analysis of the history of extradition in general and, more specifically, the practices of the United States, Great Britain and France.[89] To be sure, there are scattered statements in this article from which one might argue that it endorsed the position that specialty was a rule of public international law apart from the stipulations in any particular extradition treaty.[90] Taken as a whole, however, the thrust of Lawrence's arguments is that extradition is a practice regulated by treaties, and that specialty is implicit in any treaty that enumerates the offenses for which one may be extradited. For example, he wrote:

> [A]ll the right which a power asking an extradition can possibly derive from the surrender must be what is expressed in the treaty and that all rules of interpretation require the treaty to be strictly construed; and consequently where the treaty prescribes the offenses for which extradition can be made and the particular testimony to be required, . . . the State receiving the fugitive has no jurisdiction whatever over him, except for the specified crime to which the testimony applies.[91]

Thus, even according to the authorities relied upon by Justice Miller, it was not, as he stated, "very clear" that specialty was a "recognized public law *which had prevailed in the absence of treaties.*"[92]

C. The Status of the Rule of Specialty in 1886

Nonetheless, there is a credible theory that specialty was a non-treaty based feature of international law, at least by the time the *Rauscher* case was decided.[93] According to that theory, specialty is implicit in the right of asylum. Put another way, the asylum state surrenders the defendant to the requesting state to be prosecuted

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strued by the recognized rules of interpretation and the laws of both countries passed to give effect to treaties of extradition . . . .").

89. *Id.* at 85-98.

90. *See, e.g., id.* at 93 ("I have found no American treaty, which provides in terms that the extradited individual shall not be tried for any offense for which he was not extradited. This may be owing to its being supposed to be provided for by the law of nations . . . .").

91. *Id.* at 96.

92. *Rauscher,* 119 U.S. at 420 (emphasis added).

93. Some scholars have accepted the conclusion that specialty was a rule of customary law by the time *Rauscher* was decided, even if they question its status in 1842 when the treaty went into effect. *See, e.g.,* Semmelman, *supra* note 26, at 105.

only for the offense or offenses as to which extradition is granted.[94] Consequently, as to any other offenses the defendant may have committed, the defendant still has asylum.[95] To the extent that such a non-treaty based rule existed as a matter of customary law, however, it related only to the prohibition against prosecuting for political offenses as to which asylum had been granted.[96]

Whether that prohibition had been extended to ordinary offenses as well depends upon whether there was a non-treaty based duty to extradite for ordinary offenses. Because if there had never been such a duty, then specialty, as it pertains to ordinary crimes, is solely a matter of treaty law.[97] And while it is not impossible for a treaty-based rule to become a rule of customary international law,[98] in order for this to happen the rule must be supported by some state practice that indicates that states regard themselves as obligated to follow the rule apart from a treaty obligation to do so.[99]

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94. Lawrence, *supra* note 34, at 363. Justice Miller hinted at this rationale:

> A moment before he is under the protection of a government which has afforded him an asylum from which he can only be taken under a very limited form of procedure, and a moment after he is found in the possession of another sovereignty by virtue of that proceeding, but divested of all the rights which he had the moment before, and of all the rights which the law governing that proceeding was intended to secure.

Rauscher, 119 U.S. at 421.

95. *See* Lawrence, *supra* note 34, at 363 (stating that "the person surrendered is to be deemed still legally in the country from which he was extradited"). This must account for the feature of the rule of specialty that allows the defendant the opportunity to return to the asylum state before he can be prosecuted for any other pre-extradition offenses.

96. *See* Letter from Lord Derby to Mr. Hoffman (May 4, 1876), *in* FOREIGN RELATIONS, *supra* note 29, at 227. The letter stated as follows:

> There is no principle of international law more clearly admitted than that advanced by you [that] with regard to the right of asylum for political offenses, it is clear that the nation surrendering is to be the judge of what is or is not a political offense, the more so because opinions differ in different countries on this question.

Id. Indeed, one of the major fears, as the practice of extradition for ordinary crimes developed, was that states would use it has a subterfuge to get jurisdiction over someone who had committed a political offense. *See id.*

97. *See* MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 26 (6th ed. 1987).

98. North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 41 (Feb. 20) (observing that "[t]here is no doubt that this process . . . constitutes indeed one of the recognized methods by which new rules of customary law may be formed").

99. North Sea Continental Shelf, 1969 I.C.J. at 43 ("From their [states party to the treaty] action [in conformity with the treaty rule] no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the [treaty rule].").

1. British Practice

There were some broad assertions by British officials that specialty was a feature of customary law. [100] Those statements must be discounted because Great Britain did not recognize a non-treaty based duty to extradite.[101] This is borne out by the way the British actually behaved towards the rule because their actions strongly suggest that they regarded specialty as if it were a rule of comity, and not as if it were customary law. For example, if the rule was already customary law at the time of the Winslow case, why did the British ask for a guarantee that the United States would not violate it?[102] Why too did the British consider violation of the rule only as a ground for suspending the treaty[103] rather than an international wrong?[104] And why, if the rule was so well established that neither England nor France would think of violating even if there were no treaty provision to that effect, did the Extradition Act of 1870 require proof that the law of the foreign state included the rule of specialty or that there had been an

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100. For example, Sir Thomas Henry, the British magistrate who handled the Lawrence case (1 MOORE, *supra* note 22, at 202), in a Letter (Jan. 4, 1876) to A.F.O. Liddell of the British Home Office wrote:

> So fully is this principle recognized, that it is scrupulously observed by every European Government, whether there is any stipulation in the Treaty to that effect or not; in the Treaty between England and France there is no stipulation on the subject, but neither country would think of trying a fugitive for a crime different from that for which he was surrendered.

CORRESPONDENCE RESPECTING EXTRADITION TO BOTH HOUSES OF PARLIAMENT BY COMMAND OF HER MAJESTY 44 (1876).

Henry's statement, rather than being a broad assertion of a non-treaty based rule of specialty, *see* Semmelman, *supra* note 26, at 84-85, can also be read to mean that specialty is implicit in extradition treaties that enumerate extradition offenses. Henry's views undoubtedly influenced the inclusion of the rule of specialty in the Extradition Act of 1870 since, according to Clarke, "the country is indebted chiefly [to him]" for its passage. CLARKE, *supra* note 82, at 161.

101. CLARKE, *supra* note 82, at 161.

102. *See supra* p. 5.

103. *See, e.g.*, The Vienna Convention on the Law of Treaties, art. 60(1), May 23, 1969, 1155 U.N.T.S. 33 ("A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.").

104. *Compare* Letter of Lord Derby to Mr. Hoffman (May 4, 1876), *in* FOREIGN RELATIONS, *supra* note 29, at 230 ("[Her Majesty's government] have always regarded the claim so as to try him as a breach of the treaty of 1842" . . . and can only express their deep regret that the operation of a treaty . . . should be in danger of being so unnecessarily terminated.") *with* Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985) ("subsequent departures from the standard of conduct required by the rule [of customary law] constitute international wrongs").

agreement to that effect?[105] Such guarantees would have been unnecessary if the rule were already customary international law.[106] And, why did the *Rauscher* case itself apparently spark no protest from the British?[107] Finally, and perhaps most significantly, a Royal Commission, appointed in 1877 to consider amending British extradition laws, wrote: "A question presents itself whether, if a person be surrendered in respect of one extradition offense, he should, when transferred to the country claiming him, be liable to be tried for another. Political and local offenses being excepted, we see no reason why he should not."[108] Clearly the Commission could not have reached this conclusion if specialty were viewed as a binding rule of customary international law.

2. *French Practice*

The situation in France was somewhat different. There, the surrender of fugitives was an inherent right of the king based on a "'natural duty' under international law, either to extradite or prosecute fugitives, from one state's justice, who are found within another state's borders."[109] Grotius, one of the classical scholars

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105. Extradition Act, 1870, 33 & 34 Vict. c. 52 (Eng.); Ex Parte Bouvier, 27 L.T. 844 (Q.B. 1872), *reprinted in* FOREIGN RELATIONS, *supra* note 29, at 615-16 (extradition to France depended upon proof that specialty was a feature of French law).

106. *See supra* note 97.

107. *See supra* note 50 and accompanying text. The lack of a British protest is significant because the resumption of treaty relations after Lawrence-Winslow was, from the British perspective, contingent upon the United States keeping its promise not to violate the rule. *Supra* note 47 and accompanying text. And, the British concern that the United States keep its part of the bargain was made apparent in several post-Winslow cases. *See* 1 MOORE, *supra* note 22, at 222-33 and cases discussed therein. In the first post-Winslow case, *Hawes*, 76 Ky. (13 Bush) 697, after being advised that friends of the fugitive had informed the Governor-General of Canada that the extradition was being sought so that Kentucky could prosecute an offense that was not in the treaty, Secretary Fish wrote to the Governor of Kentucky urging him to make a bona fide effort to convict the defendant of the extradition offense before proceeding on any other charges. 1 MOORE, *supra* note 22, at 223 n.1.

One post-Winslow/pre-*Rauscher* case, In re Miller, 23 F. 32 (W.D. Pa. 1885), involved the extradition of a prisoner who had escaped while serving a seven year sentence for burglary and fled to Canada. 1 MOORE, *supra* note 22, at 229. Because burglary was not an extraditable offense, Miller was extradited on new charges of robbery and assault with intent to commit murder, although this was merely a pretext to obtain his return since he was never prosecuted for those charges. *Id.* at 230. Apparently there was no protest either by Britain or Canada, since the question whether the extradition was obtained in "good faith" might have been raised before the Canadian courts, but "having been surrendered, it was not for [Miller] to raise the question of good faith before the tribunals of his own country." *Id.* at 230-31.

108. Report of the British Royal Commission 1878, *reprinted in* U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 267, 273 (New York, Kraus 1966) (1878).

109. Blakesley, *supra* note 16, at 53.

who shared this view, made it clear, however, that this duty was unencumbered by any rule of specialty: "But the surrendering with which we here have to do is nothing more than the entrusting of a citizen to the power of another state, *for it to decide about him as it may wish.*"[110]

In any event, it is likely that what was termed a "natural duty" to extradite was really only an act of international comity. Billot, the leading nineteenth century French scholar on extradition,[111] is quoted by Professor Blakesley as having written that "it is 'an established principle that extradition *may* be authorized in the absence of a treaty.'"[112] The use of the word "may" strongly suggests that there is a discretionary right to extradite absent a treaty that is not binding as a legal obligation would be. Moreover, the obligation under French law existed only on the "basis of reciprocity,"[113] which is more characteristic of a rule of comity,[114] than it is of a rule of law, which is universally binding.[115] And, according to the seminal French case, the right of the king to extradite without a treaty was expressly "derive[d] from his birth and by virtue of which he maintains *relations of comity* with neighboring States."[116]

There are other good reasons for concluding that at the time *Rauscher* was decided the rule of specialty with respect to ordinary crimes was a feature of treaty law, even in France. The rule first appeared in a circular distributed by the French Minister of Justice in 1841.[117] The circular was issued to resolve the case of Dermenon, who had been extradited from Switzerland on a charge of fraudulent bankruptcy. After he was acquitted of that charge,

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110. H. GROTIUS, II DE JURE BELLI AC PACIS 529 (Francis W. Kelsey, trans., Clarendon Press 1925) (1646) (emphasis added). It should be noted that Grotius believed that extradition for ordinary crimes was limited to those of which the defendant had already been convicted. *Id.* at 527 n.1, 529.

111. Lawrence deemed Billot's treatise on extradition "the best work on the subject now extant." Lawrence, *supra* note 16, at 93. Both Lawrence and Moore relied on Billot for the proposition that specialty was a rule of customary international law. *See id.* at 93-94; 1 MOORE, *supra* note 22, at 217-19.

112. Blakesley, *supra* note 16, at 53 (quoting ALBERT BILLOT, TRAITÉ DE L'EXTRADITION 259 (1874))

113. *Id.* at 54.

114. Paul B. Stephan, *Treaty and Domestic Law After Medellin v. Texas*, 13 Lewis & Clark L. Rev. 11, 18 (2009) ("Comity, in other words, is a two-way street: A state can give effect to a foreign legal act or not depending on the behavior of the lawmaker that promulgated that act.").

115. Stein, *supra* note 105, at 458.

116. Blakesley, *supra* note 16, at 54 (emphasis added) (quoting Judgment of Jun. 30, 1827, Cour de Cassation, 52 BULL. DE CASSATION (CRIMINEL) 541 (1827)).

117. Note, *Winslow's Case*, *supra* note 84, at 618-19; Semmelman, *supra* note 26, at 81.

there was an attempt to prosecute him for some other offense as to which extradition had not been granted. The Minister ordered that he be released:

> It is clear that in that case his extradition could not have been obtained. It follows that we cannot take advantage of his having been given up to the French authorities upon a different ground to try him for acts which have not and could never have been the grounds of his extradition.[118]

The circular referred specifically to four countries with which France then had extradition treaties, including Switzerland, and it asserted that France could obtain extradition from countries with which it did not have extradition treaties, except for the United States and Great Britain.[119] Nevertheless, the circular is not an example of state practice supporting the existence of a rule of specialty in the absence of a treaty. Instead, because France had an extradition treaty with Switzerland in 1841, it is a statement of French practice pursuant to the treaty. And, since then, as Professor Blakesley has observed, "[a]lthough authority exists in France for allowing extradition in the absence of a treaty, the extradition treaty has been the most constant source of developing extradition law."[120]

3. The Rest of Europe

Beyond England and France, the status of the rule in the rest of Europe appears to have been more uncertain than some of the statements regarding it might suggest.[121] Near the end of the eighteenth century, Professor Lammasch of the University of Vienna was the reporter for a study by the Institute of International Law that investigated whether to revise article 26 of its Oxford Resolutions of 1880.[122] One of the questions put to those surveyed

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118. SPEAR, *supra* note 81, at 75, (quoting Circular of the Minister of Justice, April 5, 1841).

119. CLARKE, *supra* note 82, at 180. Lawrence viewed the circular as "an explanation not only of the English and American treaties with [France], under the influence of which they were negotiated, but of our treaty with England *in pari materia*, and made contemporaneously." Lawrence, *supra* note 16, at 90.

120. Blakesley, *supra* note 16, at 54.

121. *See supra* note 100.

122. RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 110 (James Brown Scott ed., William S. Hein & Co., Inc. 2003) (1916). Article 26 of the Oxford Resolutions of 1880 is quoted in 1 MOORE, *supra* note 22, at 234-36 n.1: "An extradited person ought to be

was: "Ought an extradited person be permitted to avail himself of the circumstance that the treaty or act in virtue of which he was delivered up does not permit him to be prosecuted or punished for an act other than that which formed the ground of his surrender?"[123] Representatives of Germany, Belgium, France and England reported that while the laws of their countries contained a version of the rule of specialty, none permitted the accused to raise the issue of compliance with the rule in court.[124] Sweden and Norway simply answered the question, "no," while Russia was imprecise, and "[m]ost of those addressed expressed no opinion as to what the law ought to be." [125] On March 27, 1894, the Institute adopted a resolution to revise article 26, which provided that an individual may object to her prosecution based on violations of "the prescriptions of treaties, laws of the requesting country relative to extradition, and the very instrument of extradition," making no reference to a rule of customary international law.[126] If customary law limiting the right to prosecute existed, why was it not listed as a ground for objection?

Thus there are strong reasons for questioning the *Rauscher* Court's conclusion that specialty was a rule of customary international law.[127] But even if *Rauscher* was somehow right in its finding that specialty was customary international law, the United States should not be bound by it because it consistently maintained that the rule did not apply to it,[128] and "a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures."[129]

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permitted to oppose as a preliminary objection, before the tribunal called upon to judge him definitely, the irregularity of the conditions under which his extradition was accorded."

123. 1 MOORE, *supra* note 22, at 234-36 n.1.

124. If England had truly viewed the rule of specialty as customary law, then it would have been enforceable in the English courts because, unlike treaty law, custom does not require a parliamentary act of incorporation. AKEHURST, *supra* note 97, at 44-45.

125. 1 MOORE, *supra* note 22, at 234-36 n.1.

126. RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW, *supra* note 122, at 111.

127. In any event, it would appear that this aspect of the *Rauscher* decision was merely obiter dictum since the result was based solely on the interpretation of the treaty and not on customary law. *See Semmelman*, *supra* note 26, at 107 n.255 (stating that "The decision [in *Rauscher*] rested entirely upon the Treaty"). Obiter dictum is defined as "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential" BLACK'S LAW DICTIONARY 1177 (9th ed. 2009))

128. *See, e.g., supra* note 31 and accompanying text

129. RESTATEMENT, *supra* note 6, § 102 cmt. d; *see also* Stein, *supra* note 104, at 457 ("According to that principle, a state that has persistently objected to a rule of customary international law during the course of the rule's emergence is not bound by the rule.").

IV. IS U.S. POST-*RAUSCHER* PRACTICE CONSISTENT WITH SPECIALTY AS A RULE OF CUSTOMARY LAW?

Nevertheless, some contemporary authorities seem to have ratified *Rauscher* by accepting specialty's status as customary law.[130] And while it is certainly possible that specialty has achieved that status since *Rauscher*, in order to do so the rule must be followed independently of any treaty obligation, because merely following a treaty obligation does not demonstrate the *opinio juris*[131] necessary to support the existence of a rule of customary international law.[132] And while it is also possible to deduce the existence of a rule of customary law from its appearance in parallel provisions in bilateral treaties, Professor Brownlie has warned that "considerable caution is necessary in evaluating treaties for this purpose."[133]

In this regard Professor Akehurst's observations about the rule against extraditing political offenders[134] seem equally applicable to the rule of specialty:

> [T]reaties can be evidence of customary law; but great care must be taken when inferring rules of customary law from treaties. For instance, treaties dealing with a particular subject-matter may habitually contain a certain provision; thus, extradition treaties almost always provide that political offenders shall not be extradited. It has sometimes been argued that a standard provision of this type has become so habitual

130. Bassiouni, *supra* note 1, at 430; *see also* Semmelman, *supra* note 26, at 79 n.49. Some of the sources cited by Semmelman do not unambiguously endorse the notion that specialty is a rule of customary international law. For example, Professor Brownlie states that specialty is a "general principle of international law," which has been abstracted by courts "from existing treaties and municipal provisions." BROWNLIE, *supra* note 3, at 316. Brownlie defines general principles as those common to all or nearly all domestic legal systems. *Id.* at 15-16. Professor Blakesley describes specialty as a "virtually universal principle," which it is in treaty-based extradition practice. Blakesley, *supra* note 3, at 706. Moreover, it is evident that this is the usage Blakesley intended because a few pages later he also observes that "specialty apparently does not apply in the United States for cases of rendition by means other than extradition pursuant to treaty." *Id.* at 708; *see also* Shapiro v. Ferrandina, 478 F.2d 894, 905-06 (2d Cir. 1973), *cert. dismissed*, 414 U.S. 884 (1973). Semmelman also cites *Shapiro*. Semmelman, *supra* note 26, at 79 n.49.

131. "Custom is generally considered to have two elements: state practice and *opinio juris*. State practice refers to general and consistent practice by states, while *opinio juris* means that the practice is followed out of a belief of legal obligation." Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law*, 95 AM. J. INT'L L. 757, 757 (2001).

132. North Sea Continental Shelf, 1969 I.C.J. at 43-44.

133. BROWNLIE, *supra* note 3, at 13-14.

134. *See* Blakesley, *supra* note 16, at 51-52.

> that it should be regarded as a rule of customary law, to be inferred even when a treaty is silent on that particular point. On the other hand, why would states bother to insert such standard provisions in the treaties if the rule existed already as a rule of customary law?[135]

The Restatement agrees, unequivocally stating that "the network of treaties has not created a principle of customary law requiring extradition . . . and it is accepted that states are not required to extradite except as obligated to do so by treaty."[136]

Nonetheless, there may still be a customary law rule of specialty if such a rule is applied as a matter of legal obligation in non-treaty based extraditions.[137] To determine whether current U.S. practice supports that conclusion, it is necessary to analyze the U.S. cases involving non-treaty based renditions.

A. Kidnappings and Abductions

The rule has never been applied to extra-legal renditions of fugitives from foreign countries to the United States. In *Ker v. Illinois,*[138] decided the same day as *Rauscher* and also authored by Justice Miller, the defendant, who had been kidnapped in Peru and returned to the United States, argued that the rule of spe-

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135. AKEHURST, *supra* note 97, at 26. If anything, there is a much stronger argument that the political offense exception is a rule of customary law apart from its almost universal inclusion in extradition treaties. *See supra* pp. 14-15.

136. RESTATEMENT, *supra* note 6, at 557:

> At one time it was thought that according to the law and usage of civilized nations, every state was obliged to grant extradition freely and without qualification or restriction, or to punish a wrongdoer itself. By the latter part of the nineteenth century that view had yielded to the view that delivery of persons charged with, or convicted of, crimes in another state was at most a moral duty, not required by customary international law, but generally governed by treaty and subject to various limitations. A network of bilateral treaties, differing in detail but having considerable similarity in principle and scope, has spelled out these limitations, and in conjunction with state legislation, practice, and judicial decisions has created a body of law with substantial uniformity in major respects. But the network of treaties has not created a principle of customary law requiring extradition (*cf.* § 102, Comment i), and it is accepted that states are not required to extradite except as obligated to do so by treaty.

Id.

137. The Restatement describes the doctrine of specialty as a rule found in "most international agreements, state laws and state practice," omitting any reference to customary international law. RESTATEMENT, *supra* note 6, § 477. It does not address the question whether specialty is a binding rule absent a treaty obligation. *Id.* By contrast, with regard to the political offense exception, the Restatement specifically states that it "reflects the practice of states that extradite without a treaty." *Id.* § 476 cmt. g.

138. 119 U.S. 436 (1886).

cialty barred his prosecution.[139] Justice Miller made it quite clear that specialty applied only to treaty-based extraditions because Ker was "clothed with no rights a proceeding under the treaty could have given him," so that Ker's rendition violated "no duty which this country owes to Peru or him under the treaty."[140] The result was not without irony, as one commentator has so aptly observed:

> Collectively, *Ker* and *Rauscher* established that a defendant, brought to the United States from abroad for prosecution, may not be prosecuted for crimes for which he has not been surrendered—except when he has not been surrendered for *any* crime, in which case he may be prosecuted for *every* crime.[141]

A little over a hundred years later, the Supreme Court had the opportunity to repair this embarrassing incoherency in U.S. extradition law. In *United States v. Alvarez-Machain*,[142] the Court considered whether a court was deprived of jurisdiction over a defendant who had been kidnapped in Mexico at the behest of the United States and returned to California to stand trial.[143] There were differences between *Ker* and *Alvarez-Machain*. First, there was apparently no governmental involvement in the kidnapping in *Ker*, whereas the Drug Enforcement Administration had orchestrated the kidnapping of Alvarez-Machain.[144] And second, Ker was an American national, while Alvarez-Machain was a citizen of Mexico.[145] The *Alvarez-Machain* Court did not find these differences persuasive,[146] even though the *Ker* Court found it significant that the kidnapping was "without any pretense of authority under the treaty or from the government of the United States,"[147] and labeled Ker's argument that a foreign national who

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139. *Ker*, 199 U.S. at 443.
140. *Id. Compare id. with Rauscher*, 119 U.S. at 422, which stated:
> [I]t is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceeding under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of *bad faith to the country which permitted his extradition.*

Id. (emphasis added).
141. Semmelman, *supra* note 26, at 113.
142. *Alvarez-Machain*, 504 U.S. 655.
143. *Id.* at 657.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Ker*, 119 U.S. at 443.

is a fugitive from justice acquires a right to asylum an "absurdity."[148] Unlike Ker, Alvarez-Machain was not a fugitive in Mexico claiming the right of asylum. Rather, his argument was that the extradition treaty between the U.S. and Mexico was the only way for one country to obtain criminal jurisdiction over the nationals of the other.[149] Rejecting this contention, the Court extended *Ker* to any case where a U.S. court obtained jurisdiction over a defendant by extra-legal means,[150] and even when there is an extradition treaty between the two countries, the rule of specialty does not apply.[151]

B. Comity and Waiver

Ker and *Alvarez-Machain* do not, however, deal with the situation where jurisdiction is obtained legally but outside the parameters of an extradition treaty, such as when a defendant is surrendered as a matter of comity or waives extradition. This can occur because, although the U.S. does not extradite in the absence of a treaty obligation,[152] it does request extraditions from states with

148. *Id.* at 442.

149. *Alvarez-Machain*, 504 U.S. at 663-64. Mexico protested Alvarez-Machain's abduction but not on the grounds that any prosecution of him in the United States would violate the rule of specialty. United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990). Instead Mexico complained that "the kidnapping of Dr. Alvarez Machain and his transfer from Mexican territory to the United States of America were carried out with the knowledge of persons working for the U.S. government, in violation of the procedure established in the extradition treaty in force between the two countries." *Id.* at 604.

150. *Alvarez-Machain*, 504 U.S. at 669-70.

151. It is strange that Alvarez-Machain did not argue that his prosecution violated the customary international law rule of specialty, if such a rule existed. *See* Brief for Respondent, *Alvarez-Machain*, 504 U.S. 655 (No. 91-712). Instead, respondent's customary law argument was that his kidnapping violated the international law rule that prohibits one state from violating the territorial integrity of another. It was in this regard that respondent asserted that the *Rauscher* Court's statement that the Webster-Ashburton Treaty "did not intend to depart . . . from the recognized public law which had prevailed in the absence of treaties' . . . merely supports Respondent's view that the Treaty must be read in the context of the clear international law prohibiting state-sponsored kidnapping." *Id.* at 26 n.23 (citation omitted).

Nor did Justice Stevens, writing for the dissenters, base his position on a violation of the customary law rule of specialty. Rather, Justice Stevens opined that the existence of an extradition treaty, rather than any customary law rule of specialty, "suffices to protect the defendant from prosecution despite the absence of any express language in the Treaty itself purporting to limit this Nation's power to prosecute." *Alvarez-Machain*, 504 U.S. at 678.

152. Valentine v. United States ex rel. Neidecker, 299 U.S. 5, 8-9 (1936); RESTATEMENT, *supra* note 6, at § 475 cmt. a ("The extradition law of many states, including the United States . . . provides that requests for extradition may be made only pursuant to a treaty.").

which it does not have a treaty.[153] In such situations, the lower courts have split on whether to apply the rule of specialty. In line with *Ker* and *Alvarez-Machain*, some courts view specialty as solely a treaty-based right that cannot be invoked in any non-treaty based rendition and thus no support for the customary law argument can be found in these cases.[154] Other courts apply the rule, but apparently not as a matter of customary law.[155]

It is difficult to reconcile the decisions of these courts. The cases are characterized by broad assertions that the rule is "international law" with little or no analysis or consideration of the implications. This lack of clarity is well illustrated by a trio of Second Circuit cases. In the first case, *Fiocconi v. Attorney General of the United States,*[156] the Second Circuit affirmed the district court's denial of petitioners' writ of habeas corpus,[157] while disavowing its conclusion that specialty applied only to treaty-based extraditions.[158] Instead, Judge Friendly, writing for the court, character-

153. Blakesley, *supra* note 6, at 708 n.193 (noting that when the United States requests extradition as a matter of comity, "[d]ocumentation is prepared and forwarded through the diplomatic channel in the same way it is done for extradition requests pursuant to treaty").

154. *See, e.g.,* United States v. Valencia-Trujillo, 573 F.3d 1171, 1177-79 (11th Cir. 2009) (holding that a defendant who could not establish that he was surrendered to the United States pursuant to the U.S.-Colombia Extradition Treaty could not invoke the rule of specialty because the rule "applies only to extraditions pursuant to treaty" because "[i]t was conceived in that context."); United States v. Riviere, 924 F.2d 1289, 1297 (3d Cir. 1991) (holding that where the requested state (Dominica) waived its rights under the treaty, the defendant's conviction did "not violate the rule of specialty or any other rights which the defendant is asserting under the treaty"); United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980) (whether defendant was abducted or "deported" there was no violation of the U.S.-Thailand extradition treaty; therefore, prosecution did not violate rule of specialty contained in the treaty). United States v. Lehder-Rivas, 668 F. Supp. 1523, 1528 n.6 (M.D.Fla. 1987) (noting press reports that the Colombia-U.S. Extradition Treaty had been annulled by the Colombian Supreme Court and observing that if so, "then the rule of specialty would no longer apply. An extradition based on comity is not subject to specialty.").

155. There are a number of treaty-based extradition cases where the rule, despite its presence in the treaty, is characterized as international comity. *See, e.g.,* Leighnor v. Turner, 884 F.2d 385, 389 (8th Cir. 1989); United States v. Cuevas, 847 F.2d 1417, 1426 (9th Cir. 1988); United States v. Thiron, 813 F.2d 146, 151 (8th Cir. 1987); United States v. Van Cauwenberghe, 827 F.2d 424, 428 (9th Cir. 1987); *but see* United States v. Gallo-Chamorro, 48 F.3d 502, 504 (11th Cir. 1995) ("[t]he specialty doctrine is a principle of international law").

156. 462 F.2d 475 (2d Cir. 1972), *cert. denied,* 409 U.S. 1059 (1972); *see also* United States v. Evans, 667 F. Supp. 974, 979 (S.D.N.Y 1987) (following *Fiocconi*).

157. Fiocconi v. Att'y Gen. of the United States, 339 F. Supp. 1242 (S.D.N.Y. 1971).

158. The district court, relying on the rationale of *Ker*, rejected the petitioners' argument that specialty applied to comity-based extraditions, since "*Rauscher* is a recognized exception to the general rules of criminal jurisdiction because the defendant there was extradited under a treaty which foreclosed jurisdiction to try him for offenses other than the one for which he was extradited. His immunity from prosecution under other charges derived from the treaty." *Fiocconi*, 339 F. Supp at 1246. The court of appeals saw it otherwise, stating that "we cannot agree that the basic principle of *Rauscher* is inapplicable where extradition

ized specialty as "a rule of what we would now call United States foreign relations law devised by the courts to implement the treaty."[159] For this proposition, he cited the Supreme Court's opinion in *Banco Nacional de Cuba v. Sabbatino*,[160] which considered the application of the judicially created "act of state" doctrine[161] to the nationalization of property by a foreign government [Cuba].[162] The *Sabbatino* Court described the act of state doctrine as a rule not required by international law and specifically stated no claim had ever been made that a failure to apply the rule constituted "a breach of [an] international obligation,"[163] which would be the case if it were customary law.[164] Accordingly, *Fiocconi's* conclusion that specialty applies to comity-based extraditions cannot be read to mean that such a result is required by international law.[165] Rather, it is a judicial rule designed to promote international comity because "the need for preserving the United States from a breach of faith is equally [as] strong [as it is in treaty-based extraditions]."[166]

A year later in *Shapiro v. Ferrandina*,[167] the Second Circuit considered whether a U.S. court could impose specialty on a receiving state in a case in which the defendant was being extradited from

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has been obtained as an exercise of comity by the surrendering government." *Fiocconi*, 462 F.2d at 479.

159. *Fiocconi*, 462 F.2d at 479.

160. 376 U.S. 398 (1964).

161. The *Sabbatino* Court quoted the classic formulation of the act of state doctrine: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." 376 U.S. at 416 (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).

162. *Sabbatino*, 376 U.S. at 429.

163. *Id.* at 421-22. The Court stated as follows: "That international law does not require application of the doctrine is evidenced by the practice of nations . . . . [A]nd apparently no claim has ever been raised before an international tribunal that failure to apply the act of state doctrine constitutes a breach of international obligation." *Id.* (citation omitted).

164. The Draft Articles on Responsibility of States for Internationally Wrongful Acts, arts. 1-3, *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

165. *But see* United States v. Kaufman, 858 F.2d 994, 1007 (5th Cir. 1988) (purportedly applying *Fiocconi* to a situation where it was unclear whether the defendants "were extradited, deported, or 'kicked out' of Mexico"). The *Kaufman* court understood *Fiocconi* to mean that "specialty is a general rule of international law which applies with equal force whether extradition occurs by treaty or comity." Kaufman, 858 F.2d at 1007 n.4 (citing *Fiocconi*, 462 F.2d at 479-80). In this regard, it is clear that the Fifth Circuit misread *Fiocconi*, which referred to specialty as a rule "devised by the courts" and not as international law. *See supra* pp. 25-26.

166. *Fiocconi*, 462 F.2d at 480.

167. 478 F.2d 894 (2d Cir. 1973).

the United States, pursuant to an extradition treaty.[168] Judge Friendly, again writing for the court, described specialty as having been "long recognized in international law"[169] and "[a]s a matter of international law,"[170] statements some have read as an endorsement of the rule as customary international law.[171] A closer reading of *Shapiro,* however, reveals that when Judge Friendly said that specialty was "recognized in international law," he did not mean that it was binding customary international law. Instead, he attributed the binding effect the rule has on U.S. courts to *Rauscher* and characterized it as a "self-imposed restraint." And thus:

> [It] need not necessarily imply that in the converse situation, when the courts of this country are examining an extradition request from a foreign nation, we should seek to impose limits on the scope of subsequent prosecution of a person who is to be extradited for at least one crime in any event. *Such a ruling can only be advisory in character* . . . .[172]

This reasoning is completely incongruous with the notion of customary law as a universally binding legal obligation.

Finally, in *United States v. DiTommaso,*[173] the court summarily rejected the appellant's argument that his prosecution violated the rule of specialty in a case where he had waived extradition. In so holding the court ignored its earlier decision in *Fiocconi,* which arguably could have applied to a waiver of extradition. Instead, it cited a Ninth Circuit case[174] for the proposition that "subsequent decisions have narrowly construed the doctrine of specialty by limiting *Rauscher's* holding to cases involving a formal extradition pursuant to a treaty."[175]

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168. The court recognized that the rule, "as a matter of international law" and as reflected in the U.S.-Israel extradition treaty, is "a privilege of the asylum state, designed to protect its dignity and interests, rather than a right accruing to the accused." *Id.* at 906.

169. *Id.* at 905.

170. *Id.* at 906.

171. *See* Semmelman, *supra* note 26, at 79 n.49 (citing *Shapiro,* 478 F.2d at 905-06). Semmelman cites *Shapiro,* among others, for the proposition that "[p]rinciples of customary international law—such as specialty—are now understood to be binding upon state courts." *Id.*

172. *Shapiro,* 478 F.2d at 906 (emphasis added).

173. 817 F.2d 201 (2d Cir. 1987).

174. *See Valot,* 625 F.2d at 310 (observing that whether defendant was abducted or "deported" there was no violation of the United States-Thailand extradition treaty; therefore, prosecution did not violate rule of specialty contained in the treaty).

175. *DiTommaso,* 817 F.2d at 212.

So, where does the Second Circuit stand? Is specialty applicable only in treaty-based extraditions? Or is there an exception to this rule for comity-based extraditions but not in cases based upon waiver? Despite these questions, one thing does seem apparent. Specialty is not viewed by U.S. courts as an obligatory rule of customary international law.

V. CONCLUSIONS

It is unlikely that states have ever treated specialty as a rule of customary international law international, despite the scholarly endorsements of it.[176] And, even if there once existed a "duty" to surrender fugitives,[177] by the mid-19th Century it had been replaced by an entirely treaty-based practice.[178] The emergence of the rule of specialty coincided with this change.[179] Ironically, this was just about the time that *Rauscher* was decided, so it is no surprise that *Rauscher's* dictum stands almost alone in its holding that the rule was customary law.[180] The conclusion that specialty is not customary law is reinforced by U.S. practice, both before and after *Rauscher*, which has consistently been that the rule applies only when there is an express stipulation in the treaty to that effect.[181]

The U.S. position has always made sense. The rule of specialty can exact a substantial cost when it bars prosecution for an offense for which the defendant was not extradited. In those cases, the defendant receives a "get out of jail free card" merely because he was lucky enough to be arrested in a country that could not or

176. Bush, *supra* note 78, at 946 n.41 (noting that "the better view of *Rauscher* is that it rested on weak foundations and stands for the proposition that the publicists' idealized customary law may outweigh the consistent practice of the United States and other nations"); Roberts, *supra* note 132, at 760 ("Sir Robert Jennings insists that 'most of what we perversely persist in calling customary international law is not only *not* customary law; it does not even faintly resemble a customary law.'").

177. *See supra* note 110 and accompanying text.

178. *See supra* note 137 and accompanying text.

179. *Id.*

180. Indeed in one of the first post-*Rauscher* cases, the Court, again interpreting the Webster-Ashburton Treaty, abandoned *Rauscher's* customary law rationale entirely and relied exclusively on the treaty as a source for the rule of specialty. Johnson v. Browne, 205 U.S. 309, 317 (1907) (describing *Rausher* as holding "that there was such a limitation [specialty], and it was to be found in the 'manifest scope and object of the treaty itself'"); *cf.* Bingham v. Bradley, 241 U.S. 511, 514-15 (1916) (noting that "if only one [offense] is extraditable by the treaty, this does not render appellant's detention unlawful, since it is not to be presumed that the demanding government will suffer him to be tried or punished for any offense other than that for which he is surrendered, in violation of article 3 of the treaty of 1889 [with Great Britain.]").

181. *See supra* pp. 21-28.

would not extradite him for an offense he had committed prior to his extradition. This runs counter to the strongly held view in the United States that courts are not deprived of jurisdiction over offenses merely because of the circumstances which led to obtaining jurisdiction over the defendant.[182] Consequently, because the stakes are high, substantial judicial resources are expended in litigation over whether the rule of specialty applies or not.[183]

Additionally, the rule no longer serves any significant purpose. It was originally devised to ensure that extradition for an ordinary crime was not used as a pretense to prosecute political offenders who had a right to asylum in the surrendering country.[184] Because the proscription against prosecuting for political offenses is ubiquitous in modern extradition treaties, specialty is no longer necessary to achieve that purpose.[185] It is also not necessary to protect the right of asylum, since asylum is not afforded to ordinary criminals.[186] And, finally, any legitimate concerns that the surrendering country might have that a prosecution in the United States would violate a defendant's rights or injure the interests of the surrendering country are better served by a specific agreement entered into prior to the time the defendant is surrendered.[187]

It is also clear that specialty does not protect any fundamental rights that a criminal defendant might have because, if it did, the rule would also be applied in extraditions between the states of

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182. *Ker*, 119 U.S. at 444; Frisbee v. Collins, 342 U.S. 519, 522 (1952) (stating that the Supreme Court "had never departed from the rule announced in [*Ker*]" and observing that these cases "rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards."), *rehearing denied*, 343 U.S. 937 (1952); *see also Valot*, 625 F.2d at 309 (quoting United States v. Lovato, 520 F.2d 1270, 1271 (9th Cir. 1975) ("[A]n unbroken line of cases in this circuit [holds] that forcible return to the jurisdiction of the United States constitutes no bar to prosecution once the defendant is found within the United States."), *cert. denied*, 423 U.S. 985 (1975)).

183. *See, e.g.*, Annotation, Right to Try One for an Offense Other than that Named In Extradition Proceedings, 21 A.L.R. 1405 (1922) [hereinafter Right to Try].

184. *See supra* note 20 and accompanying text.

185. *See, e.g.*, DOYLE, *supra* note 56, at 6-8.

186. *See* Convention Relating to the Status of Refugees, art. 1(F), July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150; *see also* James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT'L L. J. 257, 320-21 (2001) (stating that "the Refugee Convention restricts the right of states to engage in peremptory exclusion to common criminals that the asylum country would agree to extradite").

187. Because the rule of specialty is viewed as inadequate to protect defendants' rights, this is already the recommended practice in death penalty cases where surrendering states do have substantial interests in insuring that the death penalty is not carried out. *See* Speedy Rice & Renée Luke, *U.S. Courts, the Death Penalty and the Doctrine of Specialty: Enforcement in the Heart of Darkness*, 42 SANTA CLARA L. REV. 1061, 1094-95 (2002).

the United States. Instead, the contrary rule prevails.[188] So, specialty does not meet Professor Bassiouni's criterion that the rules applied in extradition cases should be "consistent with the application of the same norms and standards the judiciary must apply in ordinary criminal cases."[189]

In fact, it may be that in many cases the criminal defendant's interests would be better served if all the charges against him were resolved at one time. Instead, he is faced with a Hobson's choice of sorts. Either waive the protection offered by specialty or leave the jurisdiction within a reasonable period of time. If he does not do so, he then may be prosecuted even for those offenses otherwise barred by the rule of specialty.[190] This aspect of the rule smacks of a sort of gamesmanship that is somewhat unseemly.

Finally, the rule is offensive to current notions of human rights in at least two ways. First, it perversely incentivizes extra-legal renditions because in those cases the rule does not apply. As a result, there are cases, like *Alvarez-Machain*, where agents of the U.S. government plot to violate the laws of another country and engage in criminal acts in order to gain custody of a fugitive.[191] Jettisoning the rule would reduce the temptation to engage in extra-legal renditions because defendants would be in the same position vis-à-vis prosecution for prior offenses, whether jurisdiction was obtained by extradition or by other means.[192]

Specialty also denigrates individual human rights because it requires a defendant to leave the jurisdiction to which he has been surrendered in order to avoid prosecution. In cases where U.S. nationals are surrendered to the United States, the result is effectively the same as if the defendant had been banished, a practice which the Supreme Court has unequivocally condemned as a violation of basic human rights.[193] While, to be sure, in specialty

188. Lascelles v. Georgia, 148 U.S. 537 (1893); Right to Try, *supra* note 183.

189. Bassiouni, *supra* note 1, at 401.

190. *See supra* note 7 and accompanying text.

191. *See, e.g.*, United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) (allegations that defendant in drug case was kidnapped and tortured at behest of U.S. drug agents). Moreover, government regulations do not ban these tactics. The United States Attorneys' Manual requires only that prosecutors obtain "advance approval by the Department of Justice" before resorting to an "extraordinary rendition." U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL, § 15.610, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/15mcrm.htm#9-15.610.

192. *Compare supra* note 141 and accompanying text.

193. *See* Trop v. Dulles, 356 U.S. 86, 102 (1958) ("[B]anishment [is] a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies."); *see also* art. 15, Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

cases the defendant leaves as a matter of choice, his fate is not dissimilar to that of those who are rendered stateless by banishment. Chief Justice Warren described the plight of such individuals in *Trop v. Dulles*:

> His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject of termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.[194]

Specialty is a rule whose time has passed. It is not mandated by customary international law, it can stand in the way of an effective resolution of criminal charges in extradition cases, and it does not effectively protect the fundamental interests of either extraditing states or of criminal defendants.[195] Accordingly, the U.S. courts need not and should not apply the rule in any non-treaty based rendition.[196] Eliminating the rule from U.S. extradition treaties presents a far more difficult problem. Nonetheless, the U.S. should take steps to modify its extradition treaties to eliminate the rule or at least to reduce the negative effects of its application.[197] The result will be to take one step toward the more flexible and efficient system of international cooperation in extradition cases envisioned by Professor Bassiouni.

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194. *Trop*, 356 U.S. at 101-102. In *Trop*, the Court decided that a statute, which stripped deserters during a time of war who were dishonorably discharged from the military of their citizenship, violated the cruel and unusual punishment clause of the Eighth Amendment. *Id.* at 103.

195. *See* Rice & Luke, *supra* note 188, at 1096:

> The biggest problem with the doctrine of specialty is that it has been severely limited by U.S. court decisions. Decisions by prosecutors and rulings by courts are subject to public and political pressure. . . . The problems inherent in U.S. court decisions regarding extradition and the doctrine of specialty are numerous. Couple this with the willingness of U.S. courts to ignore or breach international law, such as the VCCR, and the surrendering state, along with the extradited defendant, have little left to protect their rights.

Id.

196. This could occur more frequently than one might imagine since there are over eighty countries with which the United States does not have extradition treaties. DOYLE, *supra* note 56, at 46.

197. *See, e.g.*, DOYLE, *supra* note 56, at 46 (describing liberal waiver provisions included for the first time in the 2003 revisions of the United States-Great Britain extradition treaty).